Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FRANCIS BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, ("FLSA") salary basis test of "white collar" FLSA exemptions apply to public employees?

2. Do the United States Department of Labor ("DOL") FLSA salary basis regulations in 29 C.F.R. §§ 541.5d and 541.118(a)(5), which require the loss of exempt status when an employee is "subject to" nonsafety disciplinary suspension of less than a pay period apply only in cases of actual suspension or does DOL's interpretation that a personnel rule subjecting employees to discipline alone result in loss of exempt status control the application of the rule?

3. Do the DOL's "window of correction" rules in 29 C.F.R. § 541.118(a)(6) allow an employer to treat a group of employees, police sergeants and lieutenants in this case, as exempt simply by revoking, a small portion of an offending disciplinary rule, which it had actually applied after the initiation of the litigation, to a member of the employee group, without revoking the more general "subject to discipline" rule and without actually restoring the lost compensation to the employee involved?

PARTIES TO THE PROCEEDING BELOW

The Plaintiffs in the District Court include Francis Auer, Christopher Day and James Hill, all sergeants in the St. Louis Police Department, and 286 additional similarly situated Plaintiffs, including one lieutenant, Manuel Delgado, who are listed in the footnote which follows.* All of the Plaintiffs were Appellants/Cross

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* Francis Bernard Auer; Christopher James Day; James Gilbert Hall; Francis B. Corona; Anthony Pona; Michael T. Indelicato; Richard Buehler; James E. Long; Roy Burgdorf; Donald Swanson; Lionel Abernathy; Kenneth Ackerman; Alfred Adkins; Duane Alexander; Steve W. Alsup; Roger Amelung; James Anderson; Michael Anderson; Edward L. Atherton; Roosevelt Barnes, Jr.; Vernon Barton; Richard C. Bartram; Lee Bates; Darrel Battle; Robert W. Bayless; Michael Beck; Dennis Becker; Joseph D. Beffa; Chris Beffa; Michael Bergman; John Billings; Michael Blanks; Leonard Bober; Donald L. Bohnert; Robert L. Bonzon; Frank Booker; Fred Boyd; Kenneth M. Bradshaw; Robert Brennan; Joseph Burgoon; John M. Burke; Thomas Burke; Jay Burkhard; Shadrach J. Burks; Al Carter; Michael Caruso; Salvatore Chrum; Earl Cobb; Walter Collier; Donald Columbo; Clarence Contestabile; Phillip P. Cornish; Don Cumings; Stanley Cunningham; Gordon Curd; Thomas J. Daley; Jerome Dampier; Robert Davis; Steve Debisschop; Robert Decker; Manuel Delgado; Edward S. Dickerson; Leman Dobbins; Jerry Dodson; James M. Doggendorf; Stephen Dougherty; Robert Downey; Robert J. Duffin; Daniel Duffy; Judith Dupius; Jimmie Lee Eads; Donald Ebner; Thomas Eckhard; Carl Edwards; Robert E. Farrell; Lawrence Flowers; Jackie Fowler; Leonard G. Forsting; Lynn D. Fox; Tommy Franklin; Michael Frederick; Nick Frederickson; Donald M. Frentzel; Bob Gavin; Robert George; Raymond L. Ghrist; Wilkie Glasener; James Glasscock; Thomas Godfrey; William Gooden; Joel Grant; Edward V. Graves; Darla Gray; Jesse Green; John D. Green; Robert C. Griffin, III; Ward Griggs; Wilburn Grove; Mike Guzy; Dennis Hahn; Kenneth Hahn; Arthur Hammer; Adolphus Hardy, Jr.; Donald Hardy; Steve Harmon; Ralph Harper; Edward Harper; Peggy Harris; Reggie Harris; Henry G. Harris; Gregory Hawkins; Mark Helmholt; Donald Henderson; Ronald Henderson; Leo Hertling; Stephen Hobbs; Susan Hobbs; Joseph Hoeing; Andrew Hollins; Jack W. Huelsmann; Jack Huesgen; Lloyd Huggans; Riley L. Hughes, Jr.; Edmund Ronald Jablonski; Michael Jarvis; Roy Joachimstaler; Cletus Johnson; Joe

Appellees before the United States Court of Appeals for the Eighth Circuit. The Defendants and Appellees/Cross Appellants included David Robbins, Member of the St.

W. Johnson; John Johnson; Michael Jones; Milton Jones; Richard Jones; Robert W. Jones; Rochelle Jones; Terry Kaelin; David E. Kassebaum; John Kavadas; Elmer Kavanaugh; Kenneth Kegel; Guinn Kelly; Genevieve Kelly; David Keough; Ronald R. Klein; Ronald Klier; Robert Klinger; Jerome Klipfel; Howard Klocke; Rodger G. Kohler; Gus Kolilis; Jeffrey Kowalski; Judith A. Kramer; Joseph Kriska; Robert Kruger; John P. Kuelker; Gary Kukla; Edward Kuntz; William Kusmec; Norman Land; William Landrum; Michael L. Lauer; Thomas Leassner; Frank Lebeau; Audrey L. Lee; Leo Lewis; Joseph Lievin, Jr.; Larry Dean Liggett; J.W. Loftin; Jim E. Long; Jim H. Long; Edward Longinetti; Donna Love; Dave Lowell; Michael Lowry; Edward Lynch; Anthonette Madison; Edward Magee; Thomas J. Magnan; Warren Malugen; Joseph Marcinkiewicz, Jr.; Charles Marvin; Philip F. Maugeri; Clyde McCandless; Michael McCraw; William McCuller; Joseph McCulloch; Joe McDermott; Tim McDonough; George McDonough Timothy McEntee; John McKenzie; Edward Messmer; Charles Metzner; Stanley Mierzejewski; Eugene Milne; Preston Moore; Richard Moore; James Moran; John J. Moriarty; Pat Morici; Bert Morris; Marlin Mueller; Gerard D. Murphy; Timothy Murphy; Joseph Murphy; Francis J. Meyers; Albert Napier; Paul Neudecker; Worthy Newsom; Daniel Nichols; John R. Nieman; Tom Niemeyer; Beverly Noble-Barnes; Leroy Nunally; Lawrence O'Toole; Dennis Oberdieck; Steve Olish; Ron Owensby; John Page; Manson Parks; Robert Piekutowski; John P. Podolak; Gary Poelling; Dennis Pollihan; William Priest; Joseph Priest; Billy Qualls; Dan Rechtien; Abraham Reddick; Joe Reynolds; Anthony Rice; Jack Eugene Richards; Larry Richards; Jacob D. Richardson; Herbert L. Riley; James Riordan; Simon J. Risk; Louis Rizzuti; Joseph Robinson; Michael T. Roe; Thomas L. Roth; John Roussin; Arthur Ruehl, Anthony Russo; Daniel Saltz; John Salamone; Thomas L. Saliba; Ronald Sanneman; Dana Saunders; John L. Saylor, Jr.; Charles Schaeffer; Robert Scheetz, Jr.; Jon S. Schickedanz; Gary A. Schubert; Timm Seithel; Raymond Sheehan; Michael Siemers; Samuel J. Simon; Daniel G. Simpher; Richard Simpher; Joseph B. Sims; Terrance Sloan; Russell F. Smith; Eugene Smith; Gwen Spicer; Charles Steele, Vincent R. Stehlin; Paul E. Steinart; William Stevenson, Jr.; Daniel C. Stewart; Paul Stewart; James J. Stika; Donald Storie; Richard Suzy; William G. Swiderski; Gregory Tayborn; John Taylor;

Louis Board of Police Commissioners and its acting President and the other members of that Board—Rita M. Kropf, James F. Conway, Charles Mischeaux, and Freeman Bosley, or their predecessors on the St. Louis Board of Police Commissioners.

Fred Turner; Herman Ubben; George Venegoni; Michael Vierling; Donald Volmert; James Walker; James Walsh; John Walsh; Joseph E. Walsh; Russell Whitener; Dwight D. Wideman; Michael Williams; Rodney Williams; Warren Williams; John G. Wondracheck; James Wurm; Robert Zambo, Jr.; Thomas E. Zipf.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

Francis Auer, *et al.*, the Plaintiffs in the District Court for the Eastern District of Missouri, Eastern Division and the Appellants/Cross Appellees in the Eighth Circuit Court of Appeals, petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Francis Bernard Auer, et. al. v. David A. Robbins, et al.*, 65 F.3d 702 (8th Cir. 1995).

OPINIONS BELOW

The Court of Appeals opinion is reported at 65 F.3d 702 (8th Cir. 1995) and is reproduced as Appendix A in a separately bound Appendix to this *certiorari* petition (hereinafter "Pet. App."). (Pet. App. 1a-35a).

The District Court for the Eastern District of Missouri's memoranda and orders dated October 31, 1991, and April 22, 1994, are unreported and are reproduced as Ap-

pendices B, C, D, and E. (Pet. App. 36a-74a). The District Court's final judgment dated August 26, 1994 is unpublished and is reproduced as Appendix D. (Pet. App. 67a-68a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on September 8, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petitions for rehearing or hearing *en banc* were filed.

STATUTES AND REGULATIONS

Section 213(a)(1) covering exemptions from the Fair Labor Standards Act (hereafter "FLSA"), 29 U.S.C. § 213(a)(1), is reproduced as Appendix F. (Pet. App. 75a).

The Secretary of Labor's FLSA regulations set out at 29 C.F.R. § 541.1 (the executive exemption rule), § 541.2 (the administrative exemption rule), § 541.118 (the salary basis rule), § 541.118(a)(5) (the non-safety related disciplinary pay docking rule), § 541.118(a)(6) (the "window of correction" rule), and § 541.5d (the special salary basis rule applicable to employees of public agencies) and 56 Fed. Reg. 45824 and 45828 (notices of rule making relating to 29 C.F.R. § 541.5d) are reproduced in Appendix F. (Pet. App. 76a-101a).[1] The final

[1] This Court designates as "legislative regulations" those regulations that are issued pursuant to "an express delegation of authority to [an] agency to elucidate a specific provision of [a] statute by regulations." *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

The FLSA contains in 29 U.S.C. § 213(a)(1) such an express delegation to the Department of Labor to define "executive, professional and administrative employees." The regulations set forth in 29 C.F.R. § 541.1-2 and § 541.5d are clearly such legislative regulations. 29 C.F.R. Part 541A of the FLSA exemption regulations are headed "General Regulations" and are generally designated the "legislative" regulations under the Act; DOL's "interpretations"

rule in 29 C.F.R. § 541.5d was published with DOL's comments on the salary basis test in the public sector and the disciplinary docking rule in 57 Fed. Reg. 37666 (August 19, 1992) and is reproduced in Appendix K. (Pet. App. 184a-216a).

STATEMENT OF THE CASE

1. The FLSA, provides a "white collar" exemption for "executive, administrative, and professional employees" "as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]." *See* FLSA § 13(a)(1), 29 U.S.C. § 213(a)(1). (Pet. App. 75a). The regulatory pre-conditions to exempt status include two tests: a duties test and a salary basis test. An employer has the burden of establishing that an employee fulfills the requirements of both the duties and the salary basis test prior to exempting that employee from the FLSA's minimum wage and overtime at time and one half rules. *See*, 29 C.F.R. § 541.1 and § 541.2.[2] (Pet. App. 76a-80a).

of the "general" or "legislative" regulations in 29 C.F.R. Part 541A are set forth in 29 C.F.R. Part 541B. The discussion of the "salary basis" test in § 541.118 is contained in the Code of Federal Regulations within those sections of Part 541B headed "interpretations." However, unlike some of the 541B interpretations, § 541.118 is expressly incorporated into the "legislative" regulations of 541A through § 541.5d which limits reliance on its public sector modification of the salary basis pay docking rules to a "Federal, State or local government employee who otherwise meets the requirements of § 541.118."

[2] The basic two test approach has been in place since 1940. 5 Fed. Reg. 4077 (1940), §§ 541.1(e), 2(a) and 3(b). In 1949, the DOL amended the regulations. Since that time the salary basis test has been nearly identical to 29 C.F.R. § 541.118(a). *See*, 29 Fed. Reg. 7730, 7735 (1949). In 1954, DOL further elaborated the salary basis test. *See*, 19 Fed. Reg. 4405, 4406 (1954). Finally, effective September 18, 1991, the salary basis test was amended by adding § 541.5d with regard to public employees to provide that so long as a public employee otherwise meets the salary basis requirements of § 541.118, the employee would not

A special rule with regard to the application of the salary test to public employees allows exempt public employees to be subject to part-day docking for absences for personal reasons of less than one day *but* disallows rules making public employees subject to non-safety related disciplinary pay docking in an FLSA pay period. *See*, 29 C.F.R. § 541.5d and § 541.118(a)(5); and 57 Fed. Reg. 37673-37674. (Pet. App. F, 82a, 85a and Pet. App. K, 184a).[3]

A "window of correction" rule provides that "where a deduction not permitted . . . is inadvertent, or is made for reasons other than lack of work, the exemption will not be lost *if the employer reimburses the employee for such deductions and promises to comply in the future.*" *See*, 29 C.F.R. § 541.118(a)(6). (emphasis added) (Pet. App. 82a).

2. The St. Louis Police Department employs all of the Petitioners, for all relevant periods, as police sergeants and, in one case, as a lieutenant. The Department treats the Petitioners as exempt employees under the FLSA and does not pay them time and one half compensation for overtime. The Petitioners are "subject to" the disciplinary provisions of the Department's Police Manual, Chapter 7. (Pet. App. G, 102a). Under the Manual all Petitioners are "subject to" disciplinary suspension of less than a

be disqualified as exempt on the basis that the employee's pay is subject to docking for part day absences. *See*, 56 Fed. Reg. 45824 and 45828 and 57 Fed. Reg. 37666.

[3] The DOL's publication of the final revised rule now in § 541.5d discussed commenters' suggestions that § 541.118(a)(5) be repealed to allow non-safety related disciplinary deductions from public employees' pay. The DOL considered and rejected the suggestions. The final revisions left the salary basis test in place in the public sector, although modified from the private sector rule, to allow pay docking for part day absences. The provision against non-safety disciplinary deductions in any work period in which the public employee had FLSA work time was preserved. (Pet. App. K).

full work period for infractions of over 40 non-safety related rules. (Pet. App. 107a-113a, 122a, and 143a-149a).

Two years after the 1988 filing of the complaint in this case, Petitioner Sergeant Michael Guzy received a two-day suspension without pay for violating the city's residence requirement. (Pet. App. 8a). On June 1, 1991, subsequent to Sergeant Guzy's suspension, the Department revised the Manual to provide termination as the exclusive sanction for violating the City's residence requirement but otherwise left in place the rules making all sergeants and lieutenants subject to partial work period disciplinary suspension for over 40 other non-safety reasons. (Pet. App. L, 217a). Sergeant Guzy's lost wages have never been reimbursed.[4]

3. Petitioners Police Sergeants Auer, Day and Hill, and eventually 286 additional similarly situated Petitioners, including one police Lieutenant, Manual Delgado, instituted this suit in the United States District Court for the Eastern District of Missouri on October 25, 1988. They challenged the Police Department's treatment of them as FLSA exempt employees. The complaint raised claims both that (1) all of the Petitioners were hourly, and not salaried employees, and, therefore, could not be exempt from the FLSA, and (2) that the Petitioners duties were not exempt duties.

On October 30, 1991, the district court granted the Police Department's motion for partial summary judgment holding that Lieutenant Delgado's duties were ex-

[4] No claim has ever been made that Guzy's post-litigation loss of pay has ever, in fact, been reimbursed. Respondents in their brief on appeal to the Eighth Circuit have merely stated:

> *If deemed necessary*, the Police Board should be given an opportunity to reimburse Sergeant Guzy for the two (2) days pay lost in 1990 as a result of the suspension so that his salaried status is unaffected. Respondent's Eighth Circuit Brief at 9. (emphasis added) (Pet. App. L, 219a).

empt and that St. Louis police sergeants and Lieutenants were salaried and not hourly. (Pet. App. 6a and 71a-74a.)

The case proceeded to a five day bench trial. The district court then found that most sergeants' positions performed exempt executive duties, three sergeants' positions were exempt under the administrative exemption, and one sergeant's position was exempt under the combined exemption. The district court also found that two sergeants' positions were partially non-exempt from the FLSA. Both parties appealed the decision.

On September 8, 1995, the Court below upheld the district's decision in part and reversed it in part. The Court of Appeals found that all of the positions in question involved exempt duties and that all of the Petitioners were salaried and not hourly employees. (Pet. App. 1a-35a).

4. This petition questions the Court of Appeals' application of the salary basis test. (Pet. App. 7a-10a). The Court, first, dealt with the "disciplinary deduction rule" and the fact that all Petitioners were, in fact, "subject to" disciplinary deductions of less than a full pay period for any of more than 40 violations of non-safety rules ranging from "violation of appearance standards" (Rule § 10.002) or "failure to follow radio procedures" (Rule § 7.004(gg)) to "drinking on duty (Rule § 7.004(e)). (Pet. App. 143a-149a). Based on its earlier decision in *McDonnell v. Omaha*, 999 F.2d 293, 296 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994), the Court held that "the mere possibility of an improper deduction in pay does not defeat an employee's salaried status."

Second, through its aplication of the "window of correction" rule in 29 C.F.R. § 541.118(a)(6), the Court addressed the fact that Sergeant Guzy had, in fact, been subjected to a post-litigation, intentional (not inadvertent) non-safety disciplinary deduction of less than a full

pay period. The Court held that the actual deductions suffered by Sergeant Guzy were corrected by a subsequent, post-litigation amendment to the Police Manual, which revised only the specific rule of the disciplinary code which Guzy had violated, a residency requirement, by making the sole penalty for such a violation dismissal. The Court so found even though there remained over 40 Police Manual rules subjecting Sergeant Guzy, and all the Petitioners, to suspensions of less than a full pay period. The Court further held that 29 C.F.R. § 541.118(a)(6) "simply require[s] that the employer reimburse the employee the lost wages." Again, this occured in face of the fact that the docking here occurred while the litigation was pending. Neither the district court nor the Court of Appeals found that Sergeant Guzy had, in fact, been reimbursed for the lost pay he suffered. No such finding was possible since no such reimbursement ever occurred. The Eighth Circuit held that an appellate brief's promise to reimburse *if required by a Court to do so* sufficed to transform a non-exempt to an exempt employee.

5. Petitioners seek this Court's review of the holdings of the Eighth Circuit with regard to the salary basis test, specifically, its application of the "disciplinary docking" and 'window of correction" rules.

As Table A below demonstrates, the Court of Appeals' approach conflicts with that of other Circuits. (Exhibit to this petition). There is a severe and confused division among the Circuits with regard to the salary basis test, and its "disciplinary deduction" and the "window of correction" rules.

Further, the Court of Appeal's application of the "disciplinary deduction" and the "window of correction" rules is—

> (a) at odds with the "legislative" regulations of the United States Department of Labor which are entitled to special deference, *See, Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984);

(b) at odds with the DOL's, the agency charged by Congress with application the FLSA, interpretation of its own regulations which has withstood Congressional reconsideration of the FLSA and specific tailoring of the Act to public employees and so is "persuasive evidence that the interpretation is one intended by Congress,"[8] *See NLRB v. Aerospace Co. Div. of Texton*, 416 U.S. 267, 274-275 (1974); and

(c) at odds with rules that were not changed when, in 1991 and 1992, Congress specifically considered FLSA amendments which would have similarly changed DOL's application of the salary basis test to the public sector and refused to do so; *See*, S. 1670, 102d Cong., 1st Sess. (Aug. 2, 1991); S. 3089, 102d Cong., 2d Sess. (July 28, 1992); and H.R. 5112, 102d Cong., 2d Sess. (May 1992).

Questions concerning whether the application of DOL's salary basis regulations are valid as applied to public

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[8] The Secretary of Labor's application of the "salary basis" test to the public sector is fully consistent with Congressional intent. When Congress brought all public employees within the coverage of the FLSA in 1974, "providing that virtually all non-supervisory government employees will be covered" (H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837), it certainly was aware of the Secretary's "salary basis" test, which was identified as the regulation now in place.

In 1985, this Court held that the FLSA may constitutionally regulate the wages and hours of public employees. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In the wake of *Garcia*, Congress reviewed the FLSA and its application to the public sector and enacted the Fair Labor Standards Amendments of 1985, 99 Stat. 790 (1985), to tailor the Act specifically to the public sector. New provisions were added to the FLSA to allow, for example, the use of compensatory time off, to establish a high overtime trigger in some cases, to allow special joint employment and volunteer rules, and to provide for a special compliance period. The 1985 Amendment did not, however, affect § 13(a)(1) of the Act or suggest the need for change in the rules regarding the salary basis test, disciplinary suspensions of exempt employees, or the window of correction.

employees are currently before this Court in three other petitions, each of which emphasizes the fact that this controversy raises an important issue of federal law and is the topic of a severe and confused conflict among the Circuits. *Mueller v. Reich*, Case No. 95-586 (1995); *Michigan Supervisors' Office & Professional Employees Inter'l Union v. Michigan Department of Corrections*, Case No. 96-688 (1995); and *Service Employees International Union, Local 102 v. County of San Diego*, Case No. 95-724 (1995).

This Court has emphasized that the "breadth of coverage" of the FLSA's overtime hours rules is "vital to [its] mission" of establishing a national work week standard and that statutory exemptions to the Act should be narrowly construed. *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950); and *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). The presumption is that an employee is not exempt. Exemptions must be established by an employer by "clear and affirmative evidence" that each employee for whom an exemption is claimed is entitled to a *bona fide* exemption under the Department of Labor's regulations. Under the FLSA, the employer carries the burden of proving the applicability of each exemption. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197 (1974). DOL regulated "[e]xemptions are to be narrowly construed and limited to those unmistakenly and plainly within their terms and spirit." *Arnold v. Ben Kewosky, Inc.*, 361 U.S. 388, 392 (1960).

REASONS FOR GRANTING THE PETITION

I. A SEVERE AND CONFUSED CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO THE APPLICATION OF THE FLSA SALARY BASIS TEST, ITS DISCIPLINARY DOCKING RULE, AND THE WINDOW OF CORRECTION

1. *Circuit Courts of Appeals' Recognition of Conflict In Circuits.* In June 1993, Judge Silberman of the D.C. Circuit, writing for a panel of himself, Judge Wald and Judge Ginsberg in *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993), wrote that—

> . . . the application of [the FLSA salary test, docking rules and window of correction] in 29 C.F.R. § 541.118(a) to governmental employees has given rise to a sharp split, both between judges in this circuit and between circuits. 994 F.2d at 11 (citations omitted).

He discussed a split among district court opinions within the District of Columbia comparing *Harris v. District of Columbia*, 709 F. Supp. 238, 241 (D.D.C. 1989) (requiring a showing of actual deductions) and *District of Columbia Nurses' Ass'n v. District of Columbia*, 1988 U.S. Dist. Lexis 16500 (D.D.C. 1988) (also requiring actual deductions) with *D'Camera v. District of Columbia*, 693 F. Supp. 1208, 1212 (D.D.C. 1988) (applying simply a "subject to" discipline rule).

More importantly, Judge Silberman pointed out a triple division among circuits comparing *Atlantic Firefighters v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991) (requiring actual deductions) to *Michigan Ass'n of Government Employees v. Michigan Department of Corrections*, 992 F.2d 82 (6th Cir. 1993) (requiring actual deductions when a deduction policy is ambiguous but not otherwise) to *Abshire v. County of Kern*, 908 F.2d 483, 487 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) (applying only a "subject to" rule); and comparing *Abshire* and *Brock v. Claridge Hotel and Casino*, 846

F.2d 180, 184-85 (3d Cir. 1987), *cert. denied*, 488 U.S. 925 (1988) (finding that recording and compensating for overtime inconsistent with the salary basis test) with *Hartman v. Arlington County*, 720 F. Supp. 1227, 1229 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990) (finding that recording and compensating for overtime not inconsistent with the test).

In *Kinney*, the D.C. Court of Appeals found divisions between the Ninth and the Eleventh Circuits, with additional complications from the Third, Fourth and Sixth Circuits. The D.C. Circuit joined with the Ninth and avoided the issues raised in the Third, Fourth and Sixth Circuits.

One month after Judge Silberman's dissection, Eighth Circuit Judge Gibson struggled further with § 541.118(a) and, in *McDonnell v. Omaha*, 999 F.2d 293, 297 (8th Cir. 1993), noted an even wider split, pitting the Second, D.C., Sixth, Seventh, and Ninth Circuits against the Fifth and Eleventh Circuits. The Eighth Circuit in *McDonnell* joined the Fifth and Eleventh Circuits.

Two years later, in May 1995, Fifth Circuit Judge Reavey, sitting by designation, wrote for the Tenth Circuit in *Aaron v. City of Wichita*, 54 F.3d 662 (10th Cir., 1995) noting the same divergence—this time among the Second, D.C. and Ninth Circuits, on one hand, and the Fifth, Eighth and Eleventh Circuits, on the other. The Tenth Circuit avoided choosing sides, ruling that the City of Wichita had neither an express mandatory docking rule nor a practice of actual docking, but leaned toward the iSxth Circuit's "actual docking" rule.

In May 1995, Judge Posner, of the Seventh Circuit, held that the salary test rule in § 541.118(a) is valid as applied by the Department of Labor in the public sector because it is rationally related to the objectives of the FLSA. *Mueller v. Reich*, 54 F.3d 438, 442 (7th Cir. 1995), *cert. pending*, Case No. 95-586 (1995). The division among the circuits continued to widen when, in

August, the Ninth Circuit confused matters further by holding that the entire salary basis test was invalid in the public sector. *SEIU v. San Diego*, 35 F.3d 483 (9th Cir. 1994), *en banc, denied, supp. op.* 60 F.3d 1346 (9th Cir. 1995), *cert. pending*, Case No. 95-724 (1995).

There is a severe and confused division in the Circuits concerning each of the principle legal rules applied here—

(1) *The Salary Basis Test in the Public Sector.* Whether the salary test in 29 C.F.R. § 541.5d and § 541.118, applies at all in the public sector;

(2) *Disciplinary Docking: "Subject to" or Actual.* Whether an employer rule subjecting employees to non-safety discipline for part of a work period prevents exemption under 29 C.F.R. § 541.118(a)(5);

(3) *"Window of Correction:" Only for Mistakes or Liberally Available.* Whether an employer is entitled to use a window of correction under 29 C.F.R. § 541.118(a)(6) to avoid losing exempt status for improper deductions from otherwise exempt employees, rarely, and only in the case of a true mistake which is corrected fully by reimbursement of any docking and full revocation of the deductions.

2. *Table A: "FLSA Salary Test Conflicts In Circuits."* The division in the Circuits on these issues is severe, confusing and growing. Table A depicts its breadth. (Exhibit to this petition).

II. THE DECISION BELOW CONTAINS AN ERRONEOUS INTERPRETATION OF AN IMPORTANT QUESTION OF FEDERAL LAW RELATING TO THE FLSA SALARY BASIS TEST, ITS DISCIPLINARY DOCKING RULE, AND THE FLSA WINDOW OF CORRECTION

The Eighth Circuit's decision below is not only in conflict with other circuits, it is also incorrect. Apparently ignoring the Department of Labor's regulations, the Eighth Circuit reached a decision which contradicts a reasonable interpretation adopted by the Labor Department of its own regulations concerning the application of the salary basis test in the public sector, its disciplinary docking rule, and the window of correction.

1. *Disciplinary Docking: "Subject To" vs. Actual.* According to the Court below, under 29 C.F.R. § 541.-118(a)(5), the "mere possibility of an improper deduction in pay does not defeat the employee's salaried status." (Pet. App. 8a). The Court of Appeals would have the rule be that improper deductions result in loss of exempt status only for the particular employee actually docked pay and only for the work period of the improper deduction. As discussed above, the Eighth Circuit "mere possibility" standard is the minority rule, followed by the Fifth[6] and Eleventh[7] Circuits. The Second,[8] D.C.,[9] Fourth,[10] Sixth,[11] Seventh[12] and Ninth[13] Circuits have

[6] *York v. Wichita Falls*, 994 F.2d 236 (5th Cir. 1991).

[7] *Atlanta Professional Firefighters v. Atlanta*, 920 F.2d 800 (11th Cir. 1994).

[8] *Martin v. Malcom Pernie*, 949 F.2d 611, 615 (2nd Cir. 1991), *cert. denied*, 13 S.Ct. 298 (1992).

[9] *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993).

[10] *Shockley v. Newport News*, 997 F.2d 236 (4th Cir. 1991).

[11] *Michigan Ass'n of Gov't Employees v. Dept. of Corrections*, 992 F.2d 82 (6th 1993).

[12] *Klien v. Rush-Presbyterian*, 990 F.2d 279, 289 (7th Cir. 1993).

[13] *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

adopted a rule that an employer's policies making an employee's compensation "subject to" deduction, and not actuál deductions (which, of course, would only occur in cases of disciplinary infraction), is determinative of whether purportedly exempt employees are paid on a salary basis. This stricter "subject to" rule is clearly used by the Department of Labor. *See,* Lawrence Peikes, "Tightening the White Collar Exemptions—The Court Breathes New Life into the Fair Labor Standards Act," 10 *The Labor Lawyer* 121 at 125-136 (1994). The specific "subject to deduction" language contained in § 541.118(a) establishes that it is sufficient that an employee works under rules which provide that the employee's compensation could be reduced by a suspension without pay for less than a full pay period. The Sixth Circuit has outlined the practical reasons for the rule—

> We choose to focus on the actual policy, rather than whether the policy has ever been administered for two reasons. First, this approach is more consistent with the regulatory language defining a salaried employee as one who is paid "a predetermined amount which is not *subject* to reduction because of variations in the quality or quantity of his work." Also, this approach is more consistent with the general notion of a salaried employee; as the *Abshire* court stated "either pay is fixed and immutable, and not subject to deductions, or it is contingent." Second, focusing on the actual policy is more practical and realistic. Employees subject to reduction in pay will, of course, attempt to avoid these deductions by juggling schedules and sacrificing non-work opportunities. Simply because a reduction in pay has never been applied does not mean that the employee has not been affiected by the policy subjecting the employee to pay reduction. *Michigan Ass'n of Government Employees v. Michigan Dep't of Corrections,* 992 F.2d 82, 86 (6th Cir. 1993).

Entitling only those employees who actually suffer disciplinary deductions to overtime pay, while keeping it from

those "subject to" discipline but not deserving of it, would have the odd consequence of granting overtime pay protection only to those who engage in conduct for which they may be disciplined while keeping overtime pay protection from those who comply with the employer's rules and regulations.

There is no confusion about the position of the Department of Labor on this point. In its August 19, 1992, publication of the final rule currently controlling public sector exemptions, 29 C.F.R. § 541.5d (incorporating by reference § 541.118(a)(5)'s disciplinary docking rule), the Department of Labor specifically responded to a comment on the regulations from the City of Chicago which suggested that the new rule on improper deductions be patterned "so that the exemption would be lost only in the weeks in which deduction(s) occur"—

> The Department considers the suggested change to be a significant departure from long-standing policy that is not substantiated by the comment. Nor has any basis been presented to give special treatment in this regard to the public sector. It has, therefore, not been adopted in the final rule. 57 Fed. Reg. 57675 (August 19, 1992). (Pet. App. K, 211a)

See also, the comments on the preservation of the public sector salary test and the disciplinary deduction rule, 57 Fed. Reg. 37674 (August 19, 1992). (Pet. App. K, 208a, 209a). The Eighth Circuit's interpretation of "subject to" disciplinary deductions cannot be reconciled with the clear interpretations with the DOL.

2. *Window of Correction: "Inadvertent" or "For Reasons Other Than Lack of Work"—Conjunctive or Disjunctive.* In this case, the Police Department's Manual makes sergeants and lieutenants "subject to" disciplinary deductions for violations of more than 40 rules, and the record shows an actual post-litigation, two-day deduction from a police sergeant who violated the portion of the disciplinary rules requiring St. Louis residency. However,

the Eighth Circuit held that 29 C.F.R. § 541.118(a)(6) provides a "window of correction" to any employer who revised the residency requirement post-litigation to provide only for dismissal and announces in a post-appeal brief an intent to reimburse the employee for the lost wages but, only if required by the Appellate Court to do so. (Pet. App. 10a, and Pet. App. L, 219a). The general Police Manual rule subjecting the petitioners to disciplinary suspensions for more than 40 offenses was not repealed or revised (only its application to residency violations was changed) and the compensation lost was not actually reimbursed. This is a view of 29 C.F.R. § 541.118(a)(6) clearly at odds with the "window of correction" interpretation of the Department of Labor.

The Department of Labor's interpretation of the "window of correction" is that it is only available in the case of actual mistakes where no formal policy provides for non-safety deductions, where all of the rules subjecting the employees to non-safety discipline for less than a full work period are repealed, and where an actual return of any deductions has been made. The DOL view is best outlined in the *Martin v. Malcom Pernie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 198 (1992), where the Second Circuit accepted and adopted the view pressed by the Secretary of Labor plaintiff, and in *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993). *See*, Peikes, 10 *The Labor Lawyers* at 136-140; and The Thompson Group, *Fair Labor Standards Handbook for State, Local Governments and Schools* (Washington D.C., 1989, supplemented monthly), § 222, at 32-33.

3. *Deference To The DOL.* Under this Court's mandate in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1983), the Eighth Circuit erred when it refused to follow the Department of Labor's interpretation of its rules on disciplinary docking and the window of correction. The DOL's reasonable construction

is due deference and is controlling even if the Circuit Court's own construction were equally reasonable.

In this case, the Eighth Circuit's interpretation ignores the clear wording of the regulation which requires that the employer actually repeal disciplinary rules calling for suspensions without pay and actually reimburse the compensation deductions actually made. The record here is clear. The St. Louis Manual provisions calling for disciplinary suspensions has not been repealed or revoked—only amended to revise one of more than 40 disciplinary infractions by requiring that were it to re-occur, dismissal would result. The Court relied only on a promise, in Respondent's appellate pleading, of possible future reimbursement conditioned on an order of the Court to reimburse. (Pet. App. L, 219a). The sergeant actually docked has not been reimbursed.

The Eighth Circuit's rendition of the "disciplinary docking" and "window of correction" rules is not reasonable. The Secretary of Labor's reading is entirely so. Due reference to the agency responsible for FLSA enforcement requires that the Eighth Circuit's theory does not replace DOL's interpretation of its own rules.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

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EXHIBIT

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TABLE A: FLSA SALARY TEST CONFLICTS IN CIRCUITS

Circuit		1st	2nd	3rd	DC	4th	5th	6th	7th	8th	9th	10th	11th	DOL
FLSA Salary Basis Test & "Subject To" Discipline 29 C.F.R. Sec. 541.5d and 541.118(a)(5)														
Express Indication of Conflict		—	—	—	YES #4	—	—	—	—	YES #18	—	YES #24	—	-
Salary Test In Public Sector		—	YES #1	—	YES #3 #4	YES #5 #6 #7 #8	YES #9	YES #10 #11	YES #15 #16	YES #17 #18	NO #22 YES #19 #20 #21	YES #23 #24	YES #25 #26	YES
Subject to Deduct Enough		—	YES #1 #2	—	YES #4	YES #6 #7	?	YES #10	YES #14 #15 #16	NO #17 #18	YES #19 #21	NO #23 #24	NO #25 #26	YES
Actual Deduct Needed		—	NO #1 #2	—	NO #4	NO #6 #7	?	NO #10	NO #14 #15 #16	YES #17 #18	NO #19 #21	YES #23 #24	YES #25 #26	NO
Actual Deduct Resolves Ambiguity		—	—	—	—	—	—	YES #10 #11	—	—	YES #20	YES #23 #24	—	YES
Leave Deduct Enough		—	YES #2	—	—	—	NO #9	—	—	NO #18	? #19 #20	NO #24	—	NO
Anti-discipline Rule Applied		—	YES #1	—	YES #4	YES #6 #7 #8	—	—	YES #14 #15	YES #17 #18	YES #19	—	YES #26	YES

TABLE A: FLSA SALARY TEST CONFLICTS IN CIRCUITS

FLSA Salary Basis Test & "Window of Correction" 29 CFR Sec. 541.118(a)(6)														
Circuit		1st	2nd	3rd	DC	4th	5th	6th	7th	8th	9th	10th	11th	DOL
Win'w of Correct Discuss.		—	YES #2	—	—	YES #6 #7 #8	—	YES #12 #13	YES #14	YES #17	YES #19	—	YES #27	YES
Disj'tv Actual Loss Needed		—	NO #2	—	—	NO #6 #7	—	YES #12 #13	NO #14	YES #17	NO #19	—	YES #27	NO
Conj'tv Subject To Enough		—	YES #2	—	—	YES #6 #7	—	NO #12 #13	NO #14	NO #17	YES #19	—	NO #27	YES
Formal Policy Enough		—	YES #2	—	—	YES #6 #7 #8	—	NO #12 #13	YES #14	NO #17	YES #19	—	NO #27	YES
Total Reveals Rule Needed		—	YES #2	—	—	YES #6 #7 #8	—	YES #12 #13	YES #14	NO #17	YES #19	—	YES #27	YES
Advance Actual Repayment Needed		—	YES #2	—	—	YES #6 #7 #8	—	YES #12 #13	YES #14	NO #17	YES #19	—	YES #27	YES

KEY: Numbers (# __) reference relevant Court of Appeals' precedent.
Full case citations listed by number on following pages.

CASE CITATIONS BY NUMBER:

1st Cir:

No Cases.

2nd Cir:

#1 *Whitmore v. Port Authority*, 907 F.2d 20 (2d Cir. 1990).

#2 *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 1135 S. Ct. 298 (1992).

3rd Cir:

No Cases.

D.C. Cir:

#3 *Hilbert v. District of Columbia*, 23 F.3d 429 (D.C. Cir. 1994).

#4 *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993).

4th Cir:

#5 *Allen v. County of Fairfax*, 127 Labor Cas. Para. 33,649 (4th Cir. 1994).

#6 *Shockley v. Newport News*, 997 F.2d 18 (4th Cir. 1993).

#7 *IAFF v. Alexandria*, 720 F. Supp. 1230 (E.D. Va.), *aff'd*, 912 F.2d 463 (4th Cir. 1989).

#8 *Hartman v. Arlington County*, 720 F. Supp. 1227 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990).

5th Cir:

#9 *York v. Wichita Falls*, 994 F.2d 236 (5th Cir. 1991).

6th Cir:

#10 *Michigan Ass'n of Government Employees v. Department of Corrections*, 992 F.2d 82 (6th Cir. 1993).

#11 *Michigan Supervisors' Office & Professional Employees Int.'l Union v. Department of Corrections*, 1995 U.S. App. Lexis 19956 (6th Cir. July 13, 1995), *cert. pending*, Case No. 95-688 (1995).

#12 *Reich v. Pierce*, 1994 U.S. App. Lexis 36194 (6th Cir. 1994). (Pet. App. I).

#13 *Martin v. Monks*, 1993 U.S. App. Lexis 20610 (6th Cir. 1993). (Pet. App. H).

7th Cir:

#14 *Klien v. Rush-Presbyterian*, 990 F.2d 279 (7th Cir. 1993).

#15 *Bankston v. Illinois*, 60 F.3d 1249 (7th Cir. 1995).

#16 *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *cert. pending*, Case No. 95-586 (1995).

8th Cir:

#17 *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995).

#18 *McDonnell v. Omaha*, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 1145 S.Ct. 1188 (1994).

9th Cir:

#19 *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 785 (1991).

#20 *Barner v. Navato*, 17 F.3d 1256 (9th Cir. 1994).

#21 *Hurley v. Oregon*, 27 F.3d 392 (9th Cir. 1994).

#22 *SEIU v. San Diego*, 35 F.3d 483 (9th Cir. 1994), *en banc denied, supp. op.* 60 F.3d 1346 (9th Cir. 1995), *cert. pending*, Case No. 95-724 (1995).

10th Cir:

#23 *Aaron v. Wichita*, 54 F.3d 652 (10th Cir. 1995).

#24 *Bennett v. Albuquerque*, 1995 U.S. App. Lexis 8901 (10th Cir. April 18, 1995). (Appendix J).

11th Cir:

#25 *Atlanta Professional Firefighters v. Atlanta*, 920 F.2d 800 (11th Cir. 1991).

#26 *Avery v. Talladego*, 24 F.3d 1337 (11th Cir. 1994).

#27 *Lee v. Flightsafety*, 20 F.3d 428 (11th Cir. 1994).